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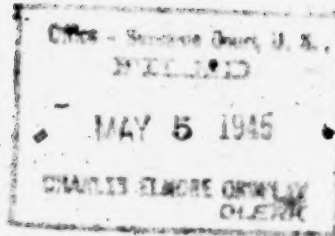
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No. 1179 63

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**In the Supreme Court of the United States**

OCTOBER TERM, 1944

NEWS PRINTING CO., INC., PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE  
WAGE AND HOUR DIVISION, UNITED STATES  
DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD  
CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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## **OPINIONS BELOW**

The opinion of the district court (R. 22-28) is reported in 49 F. Supp. 659. The majority and dissenting opinions in the circuit court of appeals (R. 89-98) are not yet reported.

## **JURISDICTION**

The judgment of the circuit court of appeals was entered on March 5, 1945 (R. 98). The petition for a writ of certiorari was filed on April 19,

1945. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

#### QUESTIONS PRESENTED

1. Whether adjudication of the issue whether petitioner is subject to the Fair Labor Standards Act is a prerequisite to judicial enforcement of a subpoena duces tecum issued by the Administrator of the Wage and Hour Division.

2. Whether enforcement of the subpoena here involved would violate rights guaranteed by the Fourth Amendment to the Constitution.

3. Whether enforcement of the subpoena would violate the freedom of press guaranteed by the First Amendment to the Constitution.

#### STATUTES INVOLVED

The statutory provisions involved are Sections 9 and 11 (a) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, and Section 9 of the Federal Trade Commission Act, 38 Stat. 717, 15 U. S. C. 49. These provisions are set forth in the Appendix to the Administrator's memorandum (filed simultaneously with this memorandum) in *Oklahoma Press Publishing Co. v. Walling*, No. 1171, this Term, also pending on petition for writ of certiorari.

#### STATEMENT

This was a proceeding instituted by the Administrator to enforce a subpoena substantially identical with that involved in *Oklahoma Press*

*Publishing Co. v. Walling*, No. 1171, this Term, pending on petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit. In its response to the order to show cause, petitioner denied that it was subject to the Act and that the district court had jurisdiction, but admitted that it daily distributes some of its newspapers outside of the state (R. 11-21).

The district court denied the Administrator's application on the ground that he was not entitled to enforcement of the subpoena without a showing that the employer is subject to the Act (R. 22-28). It held, however, that there was no merit in petitioner's contention that the application of the Act to newspapers constitutes an abridgment of freedom of the press (R. 27).

The circuit court of appeals reversed the denial of the application (R. 89-96). It held that the Administrator's application made a sufficient showing to entitle him to judicial enforcement of the subpoena (R. 94), pointing out that "to require the Administrator to make proof of coverage would be to turn the proceeding into a suit to decide a question which must be determined by the Administrator in the course of his investigation" (R. 95). The district court, it held, had erroneously treated the Administrator's application as a proceeding to enforce the statutory sanctions for violations rather than as part of an investigatory procedure. With respect to peti-

tioner's constitutional objections, the circuit court of appeals ruled that an order requiring production of the records called for "is too far removed from possible infringement of the [petitioner's] constitutional rights to render its objections presently pertinent" (R. 96).

Judge McLaughlin dissented on the ground that there was not a sufficient showing of "probable cause" or "reasonable ground for believing that petitioner's business is subject to the Act" to warrant judicial enforcement of the subpoena (R. 96-98).

#### ARGUMENT

The issues raised in this petition are virtually identical with those raised in *Oklahoma Press Publishing Co. v. Walling*, No. 1171, this Term, pending on petition for writ of certiorari to the circuit court of appeals for the Tenth Circuit, and the reasons advanced in the Administrator's memorandum in that case for denial of the petition are equally applicable here. The only additional points made by the petition in the instant case are (1) that the decision below conflicts with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Walling v. Benson*, 137 F. 2d 501, certiorari denied, 320 U. S. 791, and (2) that the enforcement of the subpoena would violate the Fourth Amendment.

1. Petitioner asserts (Pet. 5, 11) a conflict with *Walling v. Benson* because of the requirement

therein that in subpoena enforcement proceedings the Administrator show "probable cause" or "reasonable ground to believe that [the] industry is subject to the Act" (137 F. 2d at 505-506). As we point out in our memorandum in the *Oklahoma Press* case (p. 7), while some of the circuit courts of appeals have stated that there should be a showing of "reasonable grounds" for investigation, and others have not required any such showing, the courts are agreed that no trial and determination of coverage is required. Thus, even if the variation in the decisions can be properly characterized as a conflict, there is nevertheless no occasion for review of the decision below, since, on this record, there is clearly a sufficient showing of "probable cause" to meet the standard of the *Benson* decision. As the circuit court of appeals pointed out, it appears from petitioner's own affidavits that petitioner was shipping some of its newspapers in interstate commerce, and that petitioner apparently was not within the purview of any of the exemptions specified (R. 94-95).

2. Petitioner's charge (Pet. 13-14) that the judgment of the court below permits the Administrator to make a "fishing expedition" into its books and papers is unfounded. The subpoena here is similar in form and scope to the subpoenas repeatedly enforced by the courts (see cases cited in our memorandum in the *Oklahoma*



*Press case*). It is limited to specific books and papers showing the wages and hours of petitioner's employees during a particular period, and those showing the out-of-State distribution of newspapers during the same period. The information contained in these records is clearly relevant to the determination of whether or not violations have occurred, and is "part of a procedure instituted by the officer charged with the administration of the Act" (R. 95). As the court below held, petitioner "has made no showing that the production of its [employment and shipping] records would oppress it in any way" (R. 96). The decision in *Federal Trade Comm. v. American Tobacco Co.*, 264 U. S. 298, is plainly inapplicable here.

#### CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

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MAY 1945.